Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RICHARD F. HEANING,

Petitioner,

-against-

NYNEX-NEW YORK, also known as
New York Telephone Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

EARLE GIOVANNIELLO, ESQ.
Counsel of Record and
Attorney for Petitioner
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6988

QUESTION PRESENTED

Does Federal Rule of Civil Procedure 15(c) allow petitioner to amend his wrongful discharge claim against his employer to add proposed allegations of his union's breach of its duty of fair representation, on the ground that the amended claim arose out of the same transaction as his timely original claim and was thus not barred by the statute of limitations?

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IN THE SUPREME COURT

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October, 1997

Richard F. Heaning,

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v.

NYNEX - New York, also known as
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Respondent.

PETITION FOR WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

Petitioner Richard F. Heaning respectfully prays that a writ of certiorari issue to review the Order of the Court of Appeals for the Second Circuit that affirmed the Opinion and Order and Judgment of the District Court for the Southern District of New York that granted Respondent NYNEX-New York's motion for summary judgment and denied petitioner's request to amend his complaint.

OPINIONS BELOW

The Order of the Court of Appeals for the Second Circuit appears in Appendix A. The Opinion and Order of the District Court for the Southern District of New York appears in Appendix B. The Judgment of the District Court for the Southern District of New York appears in Appendix C.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on August 14, 1997. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure 15 is set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner Richard F. Heaning ("Heaning") respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the the Second Circuit that affirmed the Opinion and Order and Judgment of the District Court for the Southern District of New York that granted Respondent NYNEX-New York's motion for summary judgment and denied petitioner's request to amend his complaint.

Heaning was discharged on August 31, 1992 from his job as a service technician by respondent NYNEX-New York ("NYNEX") for allegedly, in the fall of 1988, placing an offensive magazine advertisement about a former supervisor. On August 9, 1995, less than five months after losing a labor arbitration contesting his discharge, Heaning brought this action against NYNEX in the Supreme Court of the State of New York, County of New York, alleging two causes of action -- that NYNEX had violated the collective bargaining agreement ("CBA") between New York Telephone Company and the Communications Workers of America, AFL-CIO, District One ("CWA" or the "Union") by discharging him without just cause, and that NYNEX had intentionally inflicted emotional distress on him by disclosing information from his personnel file to third parties without his consent and in violation both of NYNEX personnel policies and of the CBA.

On September 21, 1995, NYNEX removed the action to the United States District Court for the Southern District of New York on the ground that Heaning's claims depended upon interpretation of CBA and therefore were governed by §301 of the Labor Management Relations Act (the "LMRA") rather than state law.

NYNEX moved for summary judgment claiming that federal law barred the district court from considering Heaning's claims because a labor arbitrator had found that Heaning was discharged with just cause. Heaning requested permission to amend his complaint to allege that the Union breached its duty of fair representation at his arbitration. The district court denied Heaning's request to amend and dismissed the complaint, holding that Heaning's proposed amended claim would be time-barred.

Background

On March 27, 1967, Heaning started working for NYNEX as a clerk. During the next twenty-five and one-half years, Heaning received several promotions, raises, and favorable employment evaluations. At the time of his discharge on August 31, 1992, Heaning had been working as a service technician for six years with a satisfactory record.

Sometime in the fall of 1988, NYNEX's security agent Robert Culotta demanded from George Scaturro, Heaning's foreman, various documents handwritten by

plaintiff. Scaturro gave the documents, including Heaning's confidential and personal documents, to Culotta. Heaning did not consent to the disclosure of those documents, which included records of promotion requests (called Upgrade & Transfer Requests), driver's license verification, and records of plaintiff's work assignments. Those records contained personal and private information and plaintiff's date of birth, social security number and driver's license number. Neither Culotta nor foreman Scaturro had plaintiff's permission to release those documents to anyone, including authorities of the United States Postal or New York State authorities.

During that same time, Culotta gave Heaning's records to investigators of the United States Postal Service. On November 28, 1988, Heaning was told by Heaning's employer to see United States Postal Inspector Sol Farash. Inspector Farash interrogated Heaning, accusing Heaning of placing an offensive advertisement in Swinging Times magazine concerning Heaning's former supervisor Barbara Krupp, for whom plaintiff had worked several years before. Heaning told Inspector Farash that he had not placed the advertisement. When Heaning declined Inspector Farash's demand that he provide handwriting samples, Inspector Farash said that he would "make it tough" on Heaning, that he had Heaning's employment records, and that he would get a "federal warrant".

On about December 23, 1988, United States Postal Service authorities gave Heaning's records to their handwriting expert, Carl J. Raichle. Raichle was unable to determine if Heaning had written the handwritten application for the offensive advertisement.

On about March 7, 1989, Culotta hired Donald Frangipani, who provides several kinds of forensic services for a fee, to examine Heaning's employment records and the advertisement application. Frangipani concluded that Heaning wrote the advertisement application.

Shortly thereafter in March, 1989, Culotta gave Frangipani's report, the advertisement application, and Heaning's employment records to officials of the Suffolk County Police Department. At Culotta's request, Suffolk County Police Officer Thomas Farrell started a formal investigation. Officer Farrell forwarded Frangipani's report, Heaning's records and the advertisement application to the Suffolk County Police Lab for handwriting analysis. Jeffrey Luber, a forensic scientist for the Suffolk County Criminalistics Laboratory, concluded that the writer of Heaning's employment records "probably wrote" the advertisement application.

It is NYNEX's policy to keep employee records confidential and not to release them to third parties, except upon court order or written consent of

the employee. That was also Heaning's understanding of how his personal and employment records would be kept. Nevertheless, NYNEX released Heaning's records to officials of the United States Postal Service, the Suffolk County Police Department and the Suffolk County District Attorney's Office.

NYNEX's actions ultimately led to Heaning being charged with aggravated harassment in the second degree, with those records being used as evidence against him. Although the jury found Heaning guilty of that charge, on appeal, on December 21, 1993, the Appellate Term decided that the evidence was insufficient to find plaintiff guilty of that charge. On December 22, 1994, the New York Court of Appeals dismissed the prosecution's appeal.

Barbara and Edward Krupp brought a civil action against Heaning, also claiming that Heaning placed the offensive advertisement. That action was also ultimately dismissed.

The Arbitration

Through the Communication Workers of America ("CWA" or the "Union"), Heaning instituted a grievance to contest his discharge. The matter went to arbitration, with the arbitrator ruling for NYNEX.

Heaning was very unhappy with how the Union's lawyers handled his arbitration. At one point, Heaning was

told by Union lawyer Amy Young that she would no longer answer his questions and that he should direct his questions to the Union local representatives. At a few points, Heaning asked his lawyer to check the status of the case. On those occasions, Heaning's lawyer was reminded by the Union's lawyers that Heaning was not their client, but only a third party beneficiary to the Union contract. In addition, the Union and its lawyers excluded Heaning from a settlement conference and refused to tell Heaning what happened during it.

Union lawyer Amy Young acted unprofessionally during the arbitration hearing. During one of the breaks in the hearing, Young referred to Heaning as an "asshole" when talking to others at the hearing.

During the arbitration hearing, Heaning asked Young to bring up with the arbitrator NYNEX's improper disclosure of Heaning's employee records. Young refused. Heaning also asked Young to bring up other matters affecting the credibility of witnesses at the hearing. Heaning asked Young to question Barbara Krupp about Krupp's interest in the civil lawsuit Krupp had brought against Heaning. Heaning also asked Young to question NYNEX's witnesses about the fact that NYNEX had sent an agent to interview Heaning's oil burner repairman well past the time that Culotta had testified that NYNEX's investigation had ceased. Again, Young refused to present that evidence.

NYNEX gave Heaning a warning ("Final Warning") concerning an unrelated disciplinary suspension that remained in force from October 11, 1985 to October 11, 1986. Heaning was no longer on Final Warning at the time of his discharge and at the time that the offensive advertisement was placed. Young failed to present that evidence at the arbitration hearing.

On March 10, 1995, Arbitrator Herbert L. Marx, Jr. issued an Opinion and Award, finding that Heaning's discharge was with just cause. The Arbitrator found that Heaning's investigation was thorough, "justifying the conclusion that Heaning was responsible for the advertisement." In finding that discharge was appropriate, the Arbitrator relied, in part, upon an October 7, 1985 agreement concerning an unrelated disciplinary suspension, in which plaintiff had been placed on Final Warning. The Arbitrator said that, "Discharge for an offense occurring three and one-half years earlier is obviously unusual." Nevertheless, the Arbitrator held that the delay in taking action was appropriate because "the offense was gravely serious" and went "to the heart of the employee-supervisor relationship." (Neither at the time of the placement of the advertisement nor at any time after that was plaintiff supervised by Ms. Krupp.) Despite Heaning's request, the CWA refused to challenge the arbitrator's decision.

NLRB Charge

On June 20, 1995, Heaning filed a charge with the National Labor Relations Board against the Union. On July 18, 1995, the National Labor Relations Board refused to issue a complaint. NYNEX was aware of Heaning's charges against the Union.

This Case

On August 9, 1995, Heaning brought an action against NYNEX in New York State Supreme Court, New York County, alleging that, on or about August 31, 1992, NYNEX wrongfully discharged Heaning from his employment with NYNEX in violation of the CBA. The complaint also alleged that NYNEX breached its duty, under its Personnel Policies & Practices, to keep confidential and not to disclose to unauthorized persons information from Heaning's personnel file and employment records without Heaning's written consent and that NYNEX intentionally and maliciously harassed Heaning, unjustly criticized him, and procured the postal authorities to investigate him. Heaning sought damages for wages and employment benefits lost and for emotional distress, humiliation and damage to his reputation.

On September 21, 1995, NYNEX filed a notice of removal in the district court. The notice stated that the resolution of Heaning's claims "depends upon the meaning of the collective bargaining agreement" and that the district court had jurisdiction under

§301 of the Labor Management Relations Act.

NYNEX then moved for summary judgment, arguing that both claims were preempted by section 301 and hence section 301 provided the body of law that "governs the review of the instant controversy." Under section 301, NYNEX explained, the arbitrator's award in its favor was final and binding on plaintiff, and although there are recognized grounds for overturning arbitral awards, "none have been asserted by Plaintiff." Specifically, NYNEX acknowledged that an award could be overturned either for arbitral misconduct, citing Paperworkers v. Misco, 484 U.S. 29 (1987), or if the union representing the worker in the arbitration breached its duty of fair representation, citing Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

Heaning argued in opposition to summary judgment that his claims for state law tort remedies were not preempted by section 301. He also argued that, to the extent that his action was governed by section 301, the arbitration was not final and binding because the Union had breached its duty of fair representation during the arbitration. According to Heaning's affidavit in opposition to summary judgment, the Union and its attorneys had pursued his grievance in a perfunctory manner and had refused to present crucial evidence at his arbitration, including that NYNEX's Final Warning, upon which the arbitrator partially based his decision, was in

effect only from October 11, 1985 to October 11, 1986. Heaning also alleged that the Union's attorneys refused to keep his personal attorney apprised of developments and showed her hostility to him by referring to him as an "ass-hole" during a break at the arbitration hearing.

NYNEX opposed Heaning's effort to proceed on a section 301 claim by alleging a breach of the Union's duty of fair representation, on the ground that this was "a completely new claim," arguing that his state court complaint did not mention the breach of the duty of fair representation or contain any cause of action against the Union. NYNEX did not claim that it had suffered any surprise or any prejudice from the delay in alleging a breach of the duty of fair representation. Instead, NYNEX argued that plaintiff's alleged error was a violation of "the rules of pleading."

Plaintiff cross-moved, pursuant to Federal Rule of Civil Procedure 15(a), for leave to file an amended complaint. Heaning argued that he should be allowed to allege an additional cause of action -- conspiracy to violate 42 U.S.C. §1983 -- based upon many of the same facts and circumstances alleged in the original complaint. In addition, Heaning argued that he should be allowed to include in the amended complaint the allegation that CWA Local 1104 breached its duty of fair representation.

By Opinion and Order dated

November 12, 1996, the district court granted NYNEX's motion for summary judgment, dismissed the complaint, and denied Heaning's request to file an amended complaint. The district court held that Heaning's claims were preempted by Section 301 of the Labor Management Relations Act ("LMRA"), because they were dependent on the interpretation of the CBA. The district also denied Heaning's request to amend his complaint to allege a hybrid §301/fair representation claim. The district court held that claim was barred by the statute of limitations and that the relation back doctrine, under Federal Rule of Civil Procedure 15, did not apply.

The district court held that because an arbitrator had already held that the CBA was not violated, Heaning could proceed only by claiming that, in addition to NYNEX breaching its contract, the union representing him in arbitration had violated its duty of fair representation -- that is, Heaning had to pursue what has been called a "hybrid § 301/fair representation claim." The district court acknowledged that plaintiff was now alleging a breach of the duty of fair representation, but held that these allegations were untimely, because they had not been advanced until March 27, 1996, more than a year after he lost in arbitration. The district court said:

> Thus, unless plaintiff's new allegations can relate back to the filing of his Original Complaint,

> his effort to pursue a hybrid claim against the Company comes too late.

The district court then held that the new allegations did not relate back. A hybrid claim:

> centers upon a set of facts -- those concerning his representation during arbitration -- that plaintiff did not raise in connection with the `straightforward breach of contract' claim he initially set forth.

The district court held that the new allegations thus shift the focus of the action from the propriety of the discharge to the adequacy of the union counsel during the arbitration. In those circumstances, the district court held that denial of relation back was required, and the claim had to be dismissed as untimely.

The court of appeals affirmed, saying:

> We agree with the district court that plaintiff's actions do not qualify under Rule 15(c)(2), but amount, instead, to "an effort at 'artful pleading'" designed to allow him to introduce a new -- and time-barred -- complaint under the guise of amending a claim that had no merit.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this Court has never decided, and should decide, whether Federal Rule of Civil Procedure 15's relation back doctrine applies in the circumstances here. Petitioner, whose union unsuccessfully arbitrated his wrongful discharge, brought state law claims against his employer respondent NYNEX, but those claims were removed to federal court on the ground that they were governed by the collective bargaining agreement and thus LMRA §301 completely pre-empted those claims. This Court should decide whether such an aggrieved union member, who is forced out of state court, may amend his complaint in federal court to attack the validity of the arbitration that would otherwise bar a federal claim.

Petitioner should have been given an opportunity to amend his deficient section 301 claim to allege breach of the duty of fair representation. The district court's refusal of permission to proceed amounts to a violation of the oft-proclaimed liberal policy in favor of granting leave to amend a complaint rather than dismissing it outright for failure to state a claim on which relief can be granted. E.g., Foman v. Davis, 371 U.S. 178 (1962). Where a more carefully drafted complaint might state a claim, it is an abuse of discretion to dismiss without giving the plaintiff at least one chance to amend before the action is

dismissed with prejudice. Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991). Lower courts have repeatedly expressed strong disapproval when district courts dismiss without allowing such an opportunity. In re Beef Industries Antitrust Litigation, 600 F.2d 1148, 1161 (5th Cir. 1979); Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286-287 (2d Cir. 1974); Nagler v. Admiral Corp., 248 F.2d 319, 322 (2d Cir. 1957)(per Clark, J.); Downey v. Palmer, 114 F.2d 116, 117 (2d Cir. 1940).

Petitioner's failure to allege the union's breach of its duty of fair representation does not mean that the plaintiff's claim is untimely. Rule 15(c) allows a plaintiff to reassert a claim that was deficiently stated in the first place. Wright & Miller, Federal Practice & Procedure, Civil 2d, Vol. 6A, § 1497, p. 84 (1990); 3 Moore's Federal Practice ¶ 15.15[3], at 15-155 (1995).

Federal Rule of Civil Procedure 15(c) provides, in pertinent part:

> **(c) Relation Back of Amendments.** An Amendment of a pleading relates back to the date of the original pleading when
>
> * * *
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original

pleading, * * * .

Here, because Heaning's proposed amended section 301 claim, which would include the allegation of unfair representation by the Union, arose out of the conduct alleged in the original complaint, the amended pleading relates back to the date of the original complaint. Accordingly, Heaning's section 301 claim is not time-barred.

The conduct alleged in the original complaint was that NYNEX wrongfully terminated plaintiff, breached the collective bargaining agreement, violated NYNEX's Personnel Policies & Practices, wrongfully disclosed Heaning's personnel file and employment records, harassed Heaning, unjustly criticized Heaning, procured the postal authorities to investigate him, and otherwise harmed Heaning. The original complaint sought damages for lost wages and benefits, for damage to his reputation, for emotional distress and for loss of morale, confidence, humiliation. The proposed amended complaint would have alleged that same conduct. Furthermore, the additional allegation that the Union did not fairly represent Heaning arises out of that same conduct. Thus, because the amended section 301 claim arises out of the same conduct alleged in the original complaint, for purposes of the statute of limitations, it relates back to the date of the original complaint.

The district court relied heavily on Holmes v. Greyhound Lines, 757 F.2d 1563, 1566 (5th Cir. 1985), and Painter v. Mohawk Rubber Co., 636 F.2d 453, 456 (W.D. Va. 1986), as support for its denial of relation back. However, neither one involves the question of relation back to a preempted state law claim. In addition, in each case, the court's holding that the amended complaint did not relate back was an alternative ground for dismissal.

Other authority, based upon facts more closely resembling the facts here, holds to the contrary. In Spietz v. Kaiser Aluminum and Chemical Corporation, 672 F. Supp. 1368 (W.D. Wash. 1987), the Western District of Washington held that a union member's untimely breach of fair representation claim against his union related back to the timely filing of his wrongful discharge complaint against his employer.

Thus, the authority is split on whether to apply Rule 15(c) in these circumstances. The Supreme Court should resolve the split of authority.

Furthermore, the district court's holding is contrary to the permissive nature of the relation back rule. The Fifth Circuit, in Williams v. United States, 405 F.2d 234, 237 (5th Cir. 1968), held:

> As long as the amended complaint refers to the same transaction or occurrence that formed the basis

> for the original complaint and the defendant was put on notice of the claim by the first complaint, there will be no bar to amendment; even new defendants and new theories of recovery will be allowed. Travelers Ins. Co. v. Brown, 5th Cir., 1964, 338 F.2d 229, 234.

Likewise, in Drakatos v. R. B. Denison, Inc., 493 F. Supp. 942, 945 (D. Conn. 1980), the District of Connecticut said:

> To satisfy the requirements of the relation-back rule, an amendment need only spring from the same core event or transaction as that set out in the original complaint. There is no need for the original complaint to have made out a colorable or valid cause of action. Thus amendment under Rule 15(c) is freely granted to cure a defective statement of jurisdiction or to replace an inadequate legal theory.

The district court below erred by treating the denial of relation-back as an appropriate remedy for what it characterized as Heaning's effort to "subvert those interests advanced by the supremacy of federal law in the labor arena." NYNEX obtained its remedy for this "wrong" -- the right to have the case decided in federal rather than state court. Having been forced to proceed in the defendant's chosen forum, however, Heaning was entitled to an opportunity to show that he could meet the elements of a section 301 claim, including the Union's

breach of its duty of fair representation.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the Court of Appeals for the Second Circuit in this matter.

Respectfully submitted,

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Counsel of Record and
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November 12, 1997

APPENDICES

APPENDIX A -- ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AUGUST 14, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14 day of August, one thousand nine hundred and ninety-seven.

PRESENT:

HON. GUIDO CALABRESI,
HON. FRED 1. PARKER,
Circuit Judges,

HON. NEAL P. MCCURN,
*District Judge.**

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*The Honorable Neal P. McCurn, Senior District Judge of the United States District Court for the Northern District of New York, sitting by designation.

RICHARD F. HEANING,
Plaintiff-Appellant,

ORDER

v.

#96-9579

NYNEX - NEW YORK, a/k/a NEW YORK TELEPHONE COMPANY,
Defendant-Appellee.

Appearing for Appellant:
EARLE GIOVANNIELLO, Gorman & Enright. P.C., New Haven, CT.

Appearing for Appellee:
PETER D. STERGIOS, Epstein Becker & Green. P.C., New York, N.Y.

UPON CONSIDERATION of this appeal from it judgment of the United States District Court for the Southern District of New York (Sotomayor, J.), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Plaintiff Richard F. Heaning was a service technician for New York Telephone (a subsidiary of NYNEX Corp.) and a member of the Communications Workers of America, AFL-CIO, District One, Local 1104 (CWA). He was fired from his job, allegedly for serious misconduct, on August 31, 1992. Heaning unsuccessfully

challenged his discharge through the grievance and arbitration process established by the Collective Bargaining Agreement (CBA) between New York Telephone and CWA. After the arbitrator ruled that the telephone company had discharged him for "just cause," Heaning brought a complaint in the Supreme Court of the State of New York, New York County, for: (1) wrongful termination in violation of the CBA; and (2) breach of the duty of confidentiality under the CBA and the internal policies of NYNEX.

Defendant NYNEX removed the case to the federal district court, asserting that plaintiff's claims turned on an interpretation of the CBA, which is governed by § 301 of the Labor Management Relations Act. NYNEX then moved for summary judgment. It argued that Heaning's breach of contract suit (encompassing both his wrongful termination and his breach of duty claims) was preempted by § 301, which "governs actions by an employee against an employer for breach of a collective bargaining agreement." *Dougherty v. American Tel. & Tel. Co.*, 902 F.2d 201, 203 (2d Cir. 1990); *see also McKee v. Transco Prods.. Inc.*, 874 F2d 83. 85 (2d Cir. 1989).

Ordinarily, federal law requires a court to defer to an arbitrator's finding of "just cause" for termination under a collective bargaining agreement. *See DelCostello v. International Bhd of Teamsters*, 462 U.S. 151, 164 (1983)

("Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement.") In order to defeat this argument, Heaning sought to "amend" his complaint, in an affidavit in opposition to summary judgment. He there alleged (for the first time) that he had been unfairly represented at the arbitration.[1] In this way, he attempted to establish a "hybrid § 301/fair representation" claim. Such hybrid claims are among the few that allow an employee to proceed with a § 301 action despite an earlier adverse ruling by an arbitrator.[2] *See id.* at 163-65.

---

[1]In his affidavit, Heaning states that he filed a charge with the National Labor Relations Board against the union for its alleged unfair representation and that the Board declined to pursue the matter.

[2]An employee can proceed with a § 301 claim:

> when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation.

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164 (1983). Such a suit comprises two causes of action, and is the essence of hybrid § 301/fair representation claim. *See id.*

The district court (Sotomayor, J.) denied Heaning leave to amend the complaint and granted summary judgment against him on both his wrongful termination and his breach of confidentiality claims. Heaning appeals.

We review the district court's grant of summary judgment *de novo, see Lipton v,* Nature Co., 71 F.3d 464, 469 (2d Cir. 1995), and its denial of leave to amend the complaint for abuse of discretion, *see Barrows v. Forest Labs.*, 742 F.2d 54, 58 (2d Cir. 1894).

The critical issue in this case is whether Heaning's "amended" hybrid claim is timely. Hybrid § 301/fair representation claims are subject to a six-month statute of limitations. See *DelCostello,* 462 U.S. at 163 (applying federal limitations period of § 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b), to hybrid § 301 claims); *Buttry v. General Signal Corp.*, 89 F.3d 148,. 1492 (2d Cir. 1995). The arbitrator ruled against Heaning on March 10, 1995. Thus, Heaning was required to bring his claim before September 10, 1995. Heaning's complaint was timely filed in state court on August 9, 1995. But his affidavit offering new facts to support the unfair representation claim was not filed until March 2,. 1996.

The district court held (1) that "the claims which plaintiff describes in his original complaint are properly barred by the arbitrator's 'final and binding' determination that both the plaintiff's

discharge and the company's related investigation were "reasonable"; and (2) that "plaintiff's attempt to avoid the binding effect of the arbitrator's decision against him by recasting his breach of contract claim as a hybrid cause of action must be rejected as untimely," In deciding the, latter, the court found that "plaintiff's new allegations shift(ed) the primary focus of this case from the propriety of his discharge in August 1992, to the adequacy of his Union counsel in connection with an arbitration in 1994," and that these allegations, therefore, constituted a new claim which could not relate back to the filing of his original complaint.

Rule 15(c)(2) of the Federal Rules of Civil Procedure permits a party to amend its pleadings only where "the claim or defense asserted in the amended pleading arose out of the conduct, transaction. or occurrence set forth or attempted to be set forth in the original pleading." In general, the district court has discretion whether or not to grant leave to amend. *See Ruffolo v. Oppenheimer & Co.*, 897 F.2d 129, 131 (2d Cir. 1993). We agree with the district court that plaintiff's actions do not qualify under Rule 15(c)(2), but amount, instead, to "an effort at 'artful pleading'" designed to allow him to introduce a new -- and time-barred -- complaint under the guise of amending a claim that had no merit.

We have considered all of the additional arguments raised by Heaning, and find them to be without merit. We,

therefore, affirm the district court's decision for substantially the reasons it gave.

/S/
Hon. Guido Calabresi

/S/
Hon. Fred 1. Parker,

Circuit Judges.

/S/
Hon. Neal P. McCurn,

District Judge.

APPENDIX B -- OPINION AND ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 12, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x
RICHARD F. HEANING,

Plaintiff,

-against- **95 Civ. 8111 (SS)**

NYNEX -- NEW YORK,
also known as New York
Telephone Company,

Defendant.
- - - - - - - - - - - - - - - - x

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OPINION AND ORDER

The original complaint in this action, filed in state court, advanced two claims against NYNEX Corporation ("NYNEX" or "the Company"), both of which related to plaintiff s discharge from the Company. First, plaintiff claimed that his employment was terminated without "just cause," and that NYNEX therefore violated the terms of a collective bargaining agreement (the "CBA") entered into between the Company and plaintiff's union. Second, plaintiff asserted that NYNEX breached a duty of confidentiality owed to him by releasing certain of his personnel materials to state and federal authorities during the course of the Company's investigation into charges which culminated in plaintiff's discharge. Defendant removed the action to federal court on the ground that plaintiff s claims depended upon the interpretation of the CBA, and therefore were governed by §301 of the Labor Management Relations Act (the "LMRA"). Defendant now moves for summary judgment on the ground that federal law bars the Court from considering plaintiff's claims because those claims already have been advanced and rejected in an arbitration initiated by plaintiff pursuant to the terms of the CBA.

In opposition to defendant's motion for summary judgment, plaintiff has submitted an affidavit to the Court alleging -- for the first time -- that he was inadequately represented by union officials during the course of the

arbitration proceedings, thereby invalidating defendant's claim of estoppel. Plaintiff also requests leave to amend his complaint to add a cause of action, under 42 U.S.C. § 1983, charging defendant with conspiring with state and federal authorities in disclosing his personnel files in violation of plaintiff's privacy rights. Defendant maintains that plaintiff's most recent allegations are insufficient to avoid the binding effect of the arbitrator's decision, and that plaintiff's § 1983 claim is time barred. For the reasons to be discussed, I grant defendant's motion for summary judgment.

BACKGROUND

NYNEX discharged plaintiff from his position as a service technician on August 31, 1992. The Company acted based upon an investigation which concluded that plaintiff had placed an offensive advertisement in Swinging Times magazine concerning his former supervisor.

During the course of NYNEX's investigation into plaintiff's alleged misconduct, Company officials reviewed and analyzed various materials removed from plaintiff s personnel files. For example, in March, 1989, the Company hired an expert to conduct a handwriting analysis comparing the application for the offensive advertisement with plaintiff's employment records. Further, plaintiff alleges that the Company released these same materials, on various occasions in 1988 and 1989, to

investigators from the United States Postal Service, and to local police officials. According to the Complaint, NYNEX's handling of plaintiff's personnel files contravened the Company's confidentiality policies, and led ultimately to plaintiff s prosecution and conviction, on August 13 1992, for the crime of aggravated harassment in the second degree. That conviction subsequently was overturned. According to plaintiff, the decision on appeal reflected that there had been insufficient evidence to convict; according to defendant the judgment was reversed "on the law" and not on the merits. (Heaning Aff. ¶ 14; Blane Aff. Ex. B at 3).

Plaintiff was a bargaining unit employee covered by the terms of the CBA between NYNEX and the Communications Workers of America, AFL-CIO, District One, Local 1 104 (the "Union"). Following his discharge, and pursuant to the grievance and arbitration provisions set forth in the CBA, plaintiff pursued an arbitration to challenge the Company's conduct. In the arbitration, plaintiff argued that the Company discharged him without "just cause," in violation of the CBA. The arbitration took place in October, 1994, with plaintiff represented by Union counsel. In a written award dated March 10, 1995, the arbitrator determined that "[the Company's action in the discharge of Richard Heaning was with just cause," and ruled in defendant's favor. (Blane Aff. Ex. B at 9). Article 12 of the CBA provides that an

arbitration award "shall be final and binding." (Blane Aff. Ex. A at 32).

Without any reference to the arbitration proceedings or the arbitrator's award, plaintiff filed his Original Complaint dated August 9, 1995 in the Supreme Court of the State of New York, County of New York (the "Original Complaint"). Plaintiff's Original Complaint advanced two causes of action. First, plaintiff charged defendant with terminating him from his position with the Company without "just cause," thereby violating the terms of the CBA. (Original Comp. ¶ 7). Second, plaintiff claimed that the Company breached its duty "[u]nder the CBA and defendant's Personnel Policies & Practices" to preserve the confidentiality of plaintiff's employee files. (Original Comp. ¶ 10).

Defendant removed the action to this Court on September 21, 1995, on the ground that the resolution of plaintiff's claims depends upon the interpretation of the CBA, and that such matters are governed by § 301 of the LMRA. On February 29, 1996, defendants moved for summary judgment on the ground that the LMRA preempts plaintiff's state law claims, and requires that this Court defer to the arbitrator's determination that NYNEX acted with "just cause," and that the Company's investigation was "reasonable."

In support of his Opposition to Defendant's Motion For Summary Judgment

(the "Opposition"), plaintiff submitted an affidavit, dated March 29, 1996, sharply criticizing the competence and diligence of the Union attorneys who represented him during the arbitration -- a matter plaintiff did not reference in his Original Complaint. According to these new allegations, plaintiff's Union attorneys behaved "unprofessionally" during the arbitration; at times refusing to respond to plaintiff's questions, and even referring to him as an "asshole" while speaking with others at the arbitration proceedings. (Heaning Aff. ¶ 18). Plaintiff also alleges that his Union attorneys failed to present persuasive evidence on his behalf, failed to advance a number of credible arguments, and did not adequately cross-examine witnesses. For instance, plaintiffs supervisor pursued a civil claim against plaintiff which ultimately was dismissed; plaintiffs Union attorneys rejected plaintiff's advice that they cross-examine the supervisor as to the possibility that her allegations were motivated by the prospect of a civil recovery. (Heaning Aff ¶ 20). Further, the Union attorneys allegedly excluded plaintiff from a settlement conference and refused to discuss with plaintiff what transpired during their meeting with the Company's attorneys. (Heaning Aff. ¶ 23). In his affidavit, plaintiff also reveals that he filed a charge with the National Labor Relations Board (the "Board") against the Union for its alleged breach of its duty of fair representation, but that the Board declined to pursue the matter. (Heaning

Aff. ¶ 22). In sum, plaintiff purports to have been "very unhappy" with his Union representation during the arbitration. (Opposition at 5).

Plaintiff also has moved the Court for leave to file an amended Complaint. Plaintiffs proposed amended Complaint is largely identical to his Original Complaint, except that it adds a § 1983 cause of action against defendant. Plaintiff charges that, "[b]etween September 1988 and March 1989," defendant conspired with various government officials for purposes of 'depriving plaintiff of his rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution." (Amended Comp. ¶ 6). Specifically, by circulating plaintiff's personnel materials to state and federal authorities, defendant allegedly violated plaintiff's "reasonable expectation of privacy" in those materials. (Amended Comp. ¶ 7(a)).

Defendant responds to plaintiff's new allegations and to plaintiff s new claim with two basic arguments. First, with respect to plaintiff's allegations concerning the adequacy of the Union attorneys during arbitration, defendant argues that these new allegations recast plaintiff s claim into a "hybrid § 30 I/fair representation" cause of action. This is an action distinct from the "unjust discharge" claim plaintiff initially brought in state court. Therefore, plaintiff's new allegations should not be related back to the filing of the Original Complaint, and because

the statute of limitations applicable to hybrid claims is six months, defendant's argument continues, plaintiff is time bar-red from asserting his new "unfair representation" allegations. Second, as to plaintiff's § 1983 claim, defendant contends that this claim accrued in 1998 or 1989, the time in which defendant allegedly circulated plaintiff s personnel materials to state and federal investigators. Thus, even if this claim relates back to the time of the filing of the Original Complaint on August 9, 1995, the three year statute of limitations applicable to § 1983 claims has expired and precludes plaintiff from making his proposed amendment. I agree with defendant's contentions.

DISCUSSION

A. § 301 Preemption

"Section 301 of the LMRA governs actions by an employee against an employer for breach of a collective bargaining agreement." Dougherty v. American Telephone and Telegraph. Co., 902 F.2d 201, 203 (2d Cir. 1990). A plaintiff cannot escape § 301 preemption simply by formulating a claim as one arising under state tort law:

> if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States)

> is preempted and federal labor-law principles -necessarily uniform throughout the Nation -- must be employed to resolve the dispute.

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S- 399, 405-06 (1988); Allis-Chalmers Corp v. Lueck, 471 U.S. 202, 210 (1985) ("If the policies that animate § 30I are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations."), Dougherty, 902 F.2d 201, 203 (2d Cir. 1900) (holding that plaintiffs tort law "formulation is not binding upon [the Court] where rights and obligations under the pertinent collective agreement are inextricably involved in the underlying claim."). This is not to say that every state-law claim brought by a union employee is preempted by § 301: "rights and obligations that are truly independent of a collective bargaining agreement are enforceable." Dougherty, 902 F.2d at 203. However, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as preempted by federal labor-contract law." Allis-Chalmers, 471 U.S. at 220 (citations omitted).

Therefore, in order to determine whether plaintiff s claims for wrongful discharge and for breach of confidentiality are preempted by § 3 0 1, this Court must consider whether

resolution of these matters is "substantially dependent" upon the terms of the CBA. Id. Under this standard, plaintiff's claim that he was discharged without "just cause" -- a duty which plaintiff draws explicitly from the language of the CBA -- is "indisputably" preempted by § 301 of the LMRA. Paradis v. United Technolovies, 672 F. Supp. 67, 69 (D. Conn. 1987); see also Anderson v. Coca Cola Bottling Co., 772 F. Supp. 77, 81 (D. Conn. 1991) ("The only 'just cause' provision that could apply to plaintiff s employment contract is contained in the collective bargaining agreement."). In fact, there is no dispute on this point; in his Opposition, plaintiff does not challenge defendant's position that the "unjust" discharge claim is preempted by § 301. A more difficult question -- indeed, the contested question -- arises with respect to plaintiff's breach of confidentiality claim.

In his Opposition, plaintiff relies upon Lingle for the proposition that a state tort claim which can be resolved without reference to a collective bargaining agreement is not preempted under § 301. See Lingle, 486 U.S. at 411 (finding no preemption as to union employee's claim of retaliatory discharge). Plaintiff goes on to assert, without any reference to the specific allegations set forth in his Complaint, that his breach of confidentiality claim does not depend upon an interpretation of the CBA. Plaintiff's explanation of the governing legal standard is correct:

where an employer allegedly breaches a duty which exists independently of any collective bargaining agreement, an action for the breach of that duty is not preempted under §301 of the LMRA. Id. Plaintiff's assertion that he has advanced a claim which does not depend upon application of the CBA, however, is plainly wrong.

In both his original, and proposed amended complaints, plaintiff invokes "the CBA and defendant's Personnel Policies & Practices" as the source of the duty of confidentiality which the Company allegedly breached by releasing plaintiff's personnel materials to state and federal investigators. (Original Comp. ¶ 10; Amended Comp. ¶ 20). In his proposed amended complaint, plaintiff refers the Court to Article 35 of the CBA -- captioned "Inspection of Employee Records" -- as a source of the duty of confidentiality which defendant allegedly breached. (Amended Comp. ¶ 8). Further, in the single passage of defendant's personnel policy which plaintiff excerpts in his Opposition, the Company expressly reserves the right to use and disclose personnel materials "in accordance with [its] collective bargaining obligations." (Opposition at 11). In sum, plaintiff repeatedly frames his breach of confidentiality claim with reference to the CBA and thereby undermines and explicitly contradicts his argument that his claim is not "substantially dependent' upon its application. See McKee v. Transco Products, Inc., 874 F.2d 83, 85 (2d Cir.

1989) ("Because plaintiffs claimed that Transco breached a collective bargaining agreement, we agree with the district court that § 301 was properly pled, and that appellants cannot now transform this case into simply a state breach of contract claim."). Indeed, plaintiff has not proffered any argument suggesting a way in which to assess his claim that the Company breached its duties under "the CBA and the defendant's Personnel Policies & Practices" without applying the CBA. Thus, plaintiff's breach of confidentiality claim is preempted under federal law.

Plaintiff charges that defendant's alleged breach of its duty of confidentiality is actionable also as a claim for the "intentional infliction of emotional distress." (Amended Comp. ¶ 22). This cause of action requires a showing, *infer alia,* of "extreme and outrageous" conduct by defendant. Conniff v. Dodd, Mead & Co., 593 F. Supp. 266, 269 (S.D.N. Y. 1984). Because the allegedly outrageous conduct in this instance was defendant's breach of a duty arising under the CBA, preemption applies whether plaintiff formulates his claim as one for breach of contract or for the intentional infliction of emotional distress. See McCormick v. AT & T Technologies, Inc., 934 F.2d 531, 536-37 (4th Cir. 199 1) ("Here, interpretation of the collective bargaining agreement is essential to determine whether and to what extent AT & T owed McCormick a duty concerning his work locker. If management owed him no duty and was

entitled under the agreement to dispose of the contents of his locker in the manner it did, its actions *ipso facto* could not have been wrongful under state law."), cert. denied, 502 U.S. 1048 (1992); Anderson, 772 F. Supp. at 82 ("Plaintiff's tort claims arise out of work related disputes governed by the collective bargaining agreement"); Dulay v. United Technologies Corp, 3:93-cv-2020(JAC), 1994 WL 362149, * 5 (D. Conn. June 10, 1994) (distinguishing claims for intentional and negligent infliction of emotional distress; a claim of intentional infliction of emotional distress requires the court "to determine whether the defendant's conduct exceeded the bounds of the collective bargaining agreement.").

The Court's ruling is consistent with decisions in several Circuits in which courts have preempted a variety of claims arising out of defendant corporations' alleged misconduct during the course of investigations culminating in challenged dismissals. See e.g., Willis v. Reynolds Metals Company, 840 F.2d 254, 255 (4th Cir. 1988) (preempting plaintiff employee's invasion of privacy claim where "the alleged wrong by [the employer] in the instant case directly dealt with its right pursuant to a collective bargaining agreement to conduct investigations into possible harassment of one employee by a co-worker"); Scott v. Machinists Automotive Trades District Lodge No. 190 of Northern California, 827 F.2d 589, 594 (9th Cir. 1987) ("state tort claims for intentional

infliction of emotional distress are preempted when they arise out of the employee's discharge or the conduct of the defendants in the investigatory proceedings leading up to the discharge."). As is the case here, such claims typically are intertwined with the defendant corporations' rights and obligations under the collective bargaining agreements which prescribe the appropriate bases for dismissal. Id. Thus, as precedent and logic dictate, I consider both plaintiff's unjust discharge claim, and plaintiff's breach of confidentiality claim, in accordance with federal law governing disputes arising under collective bargaining agreements.

B. "Hybrid § 301/Fair Representation" Allegations

Under federal law, courts ordinarily must defer to the judgment of arbitrators called upon to resolve disputes between employees and employers arising under collective bargaining agreements. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 163-64 (1983) ("Ordinarily . . . an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement.") (citations omitted). Under a narrow set of circumstances, however, an employee can proceed with a § 301 claim despite an

earlier adverse ruling by an arbitrator:

> when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation ... an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceedings.

Id. at 163-164 (citations ommitted); see also Brazinski v. Amoco Petroleum Additives Co., 6 F.3d I 1 76, 1179 (7th Cir. 1993) ("the worker cannot prevail in his section 301 suit merely by showing that his grievance is a just one. That is, he cannot show just that the company violated the collective bargaining agreement. He must also show that . . . the union violated its duty to represent all members of the bargaining unit fairly."); see also Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1472 (9th Cir. 1984) ("Collective bargaining agreements customarily provide for grievance and arbitration procedures, and unless an employee can show that he was not fairly represented by his union, grievance and arbitration is the employee's exclusive remedy for a breach of the agreement."). Because such a claim includes a challenge both to the propriety of the employee's discharge and to the adequacy of the employee's union representation, it is properly

characterized as a"hybrid§301/fair representation"claim. See DelCostello, 462 U.S. at 165.

Plaintiff s Original Complaint does not describe a hybrid claim; it describes a straightforward breach of contract claim. Indeed, the Original Complaint never mentions the arbitration, and it never raises any allegation even hinting at a claim of "unfair representation." Instead, in his Original Complaint, plaintiff focuses exclusively upon the circumstances of his termination from the Company and purports to set forth state law causes of action for "unjust discharge" and "breach of duty." Thus, the claims which plaintiff describes in his Original Complaint are properly barred by the arbitrator's "final and binding" determination that both the plaintiff's discharge and the Company's related investigation were "reasonable."

For the first time, in the March 29, 1996 affidavit he submitted in support of his Opposition, plaintiff set forth several allegations of "unfair representation" -- allegations which convert plaintiff's claim into a hybrid cause of action. See McKee, 874 F.2d at 86-87 (holding that a plaintiff cannot avoid having his claim created as a "hybrid" simply by declining to characterize it as such in his complaint; the court is free to consider the true nature of the allegations advanced either in the pleadings or in supporting affidavits). Hybrid claims, however,

carry a six month statute of limitations. DelCostello, 462 U.S. at 169. Plaintiff lost at arbitration on March 10, 1995; he filed his state court action on August 9, 1995; and he submitted his Opposition on March 27, 1996. Thus, unless plaintiff's new allegations can relate back to the filing of his Original Complaint, his effort to pursue a hybrid claim against the Company comes too late.

Rule 15 of the Federal Rules of Civil Procedure permits a party to amend its pleadings when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2)- "The main inquiry under Fed.R.Civ.P. 15(c) is whether adequate notice has been given to the opposing party 'by the general fact situation alleged in the original pleading.' An amendment will not relate back when it sets forth a new set of operational facts; it can only make more specific what has already been alleged." Pruiss v. Bosse, 912 F- Supp. 104, 106 (S. D.N. Y. 1996) (citations ommitted); see also Liebowitz v. Elsevier Science Ltd., 927 F. Supp. 688, 706 (S.D.N. Y. 1996) (denying relation back, in part, because "the third amended complaint does not simply set forth more fully the same matter alleged in the original complaint."); Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985) ("when new or distinct conduct transactions, or Occurrences are alleged as grounds for recovery, there is no

relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed.").

Plaintiff s "hybrid § 301/fair representation" claim centers upon a set of facts -- those concerning his representation during arbitration -- that plaintiff did not raise in connection with the "straightforward breach-of-contract" claim he initially set forth:

> 'To prevail against either the Company or the union, employee-plaintiff must not only show that their discharge was contrary to contract but must also carry the burden of demonstrating breach of a duty by the Union.' The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach-of-contract under § 301 . . . but a hybrid § 301/fair representation claim . . .

DelCostello, 462 U.S. at 165 (finding no state law analog for a hybrid claim, and borrowing the applicable six month limitations period from the National Labor Relations Act). Indeed, "the indispensable predicate for [a hybrid claim] is not a showing under traditional contract law that the discharge was a breach of the collective-bargaining agreement, but instead a demonstration that the Union breached its duty of fair representation." See United Parcel

Service, Inc. v. Mitchell, 451 U.S. 56, 62 (198 1); see also Flanigan v. IBT, Truck Drivers Local 671, 942 F.2d 824, 828 (2d Cir. 1991) ("appellants were required in this hybrid section 301 action to prove that the Union breached its duty of fair representation before proceeding against [the defendant employer]."). Thus, plaintiff's new allegations shift the primary focus of this case from the propriety of his discharge in August 1992, to the adequacy of his Union counsel in connection with an arbitration held in October 1994. Id., see also Holmes, 757 F.2d at 1566 (reasoning that an amended complaint setting forth a hybrid cause of action against an employer and a union "focused entirely upon allegations that the Union breached its duty of fair representation in several respects,"). For purposes of Rule 15, then, plaintiff s allegations of unfair representation describe a new claim, arising out of a different "transaction, or occurrence," than was put into issue by his Original Complaint.

The Court's decision to deny relation back advances one of the primary purposes of any statute of limitations -- that is, "to ensure fairness to defendants." See Aslandis v. United States Lines, Inc., 7 F.3d 1067, 1074 (2d Cir. 1993); see also DelCostello, 462 U.S. at 168 (noting the federal interest in the "relatively rapid final resolution of labor disputes"). In his Original Complaint, plaintiff did not even mention his Union attorneys, the arbitration or the arbitrator's adverse decision; he

provided defendant with no grounds to anticipate that it would become necessary to defend against hybrid allegations. See Holmes, 757 F.2d at 1566 ("In determining if an amended complaint relates back, this Court regards as 'critical' whether the opposing party was put on notice regarding the claim raised therein.") (citations omitted). Instead, by avoiding the issue, plaintiff made an effort at "artful pleading" designed to avoid federal preemption. See Olguin, 740 F.2d at 1472 ("employees frequently attempt to avoid federal law by basing their complaint on state law"). In so doing, plaintiff sought to subvert those interests advanced by the supremacy of federal law in the labor arena. Id., see also Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1957) ("The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."). It was only when defendant complicated plaintiff's efforts, by invoking the arbitrator's decision, that plaintiff attempted to restructure his allegations to describe a "hybrid" § 301 claim which would not be barred under federal law. "Fairness" dictates against relation back in these circumstances; defendant should not have to respond to plaintiff's allegations simply to accommodate plaintiff in his attempt to resuscitate his claims after his initial strategy for avoiding preemption and for remaining in state court failed.

In support of relating his "unfair representation" allegations back to the Original Complaint, plaintiff relies upon Spietz v. Kaiser Aluminum & Chemical Com., 672 F. Supp. 1368 (W.D. Wash. 1987). There, the Court permitted relation back between an unjust discharge claim brought solely against the plaintiff's employer, and a subsequent hybrid claim which included allegations of "unfair representation" and which added the plaintiff's union as a defendant. Despite invoking Rule 15 in support of its decision to permit relation back between these two claims, the Spietz Court offered no analysis of whether a hybrid claim arises out of the same "transaction or occurrence" as a claim for unjust discharge. Instead, the Court was satisfied simply that it "appear[ed]" that plaintiffs union received "some informal notice" of the action against it. Id. at 1371. In light of the unique nature of a hybrid claim, and in view of those fairness and expediency considerations which animate the applicable limitations period, this Court simply does not agree with such an approach. Moreover, this Court is not alone; the Spietz ruling is inconsistent with a recent decision, within this Circuit, addressing similar issues. See White v. White Rose Food, 930 F. Supp. 814 (E.D.N.Y. 1996).

In White, the Court declined to permit relation back between a hybrid claim brought by plaintiff employees against then- employer and their union, and an earlier claim by the plaintiffs

against their employer alleging breach of a collective bargaining agreement. See White, 930 F. Supp. 814. In their initial complaint; plaintiffs charged that their employer failed to distribute funds to the employees as required by the terms of a settlement agreement which had been negotiated with the employees' union. Id. at 817. In a third amended complaint, the employees attempted to add a claim against their union for its alleged failure to pursue the plaintiffs' grievances at arbitration. Id. at 818. The White Court stressed that an allegation of unfair representation was an "essential element to maintaining a Section 301 suit against the employer," and that "[n]o such claim was alleged in plaintiffs' original complaint." Id. at 819-820. The White Court went on to hold that, "in the absence of a timely allegation that the union acted in breach of its duty of fair representation," a claim against the employer under § 301 "could not be maintained." Id. at 823.

The Court finds further support for its ruling in a number of cases addressing a situation closely analogous to the one presently at issue. See, eg., Holmes, 757 F.2d 1563; Painter v. Mohawk Rubber Co., 636 F. Supp. 453 (W. D. Va. 1986). Specifically, relation back is not permitted where plaintiff employees who initially file claims against their employers challenging the legal sufficiency of arbitration decisions against them subsequently reframe their claims as "hybrids," and add their unions as defendants. Id. Such amendments shift

the focus of the employees' case away from the propriety of the arbitrator's decision upholding the plaintiff's discharge to the adequacy of the plaintiff's union representation. See Holmes, 757 F.2d at 1566. Like here, then, the initial claim against the employer is transformed by the introduction of allegations of "unfair representation" by the union. Thus, also as in this case, "there is no relation back." Id. at 1566.

For the reasons discussed, plaintiff's attempt to avoid the binding effect of the arbitrator's decision against him by recasting his breach of contract claim as a hybrid cause of action must be rejected as untimely. Accordingly, plaintiff s claims for unjust discharge and for the Company's alleged breach of its duty of confidentiality are dismissed.

C. The § 1983 Claim

In his proposed amended complaint, plaintiff also invokes § 1983 as a basis for recovery against the Company. Specifically, plaintiff describes defendant's alleged cooperation with state and federal investigators, occurring "between September 1988 and March 1989," and charges that:

> By conspiring with federal and state authorities to seize and disclose plaintiffs personal records, defendant conspired to deny plaintiff his rights under the

> Fourth, Fifth and Fourteenth Amendments of the United States Constitution to due process of law and to be free from unreasonable searches and seizures.

(Amended Comp. ¶ 9). The object of the alleged conspiracy, according to plaintiff, was to deny plaintiff his "reasonable expectation of privacy" in his personnel materials. Id. at ¶ 7(a).

Both sides agree, as they must, that "[t]he applicable statute of limitations for § 1983 actions arising in New York requires claims to be brought within three years." Pinaud v. County of Suffolk, 52 F.3d 1139, 1156 (2d Cir. 1995). The parties do not agree, however, upon the appropriate date of accrual for plaintiff's § 1983 claim. Defendant maintains that plaintiffs claim accrued during the time that the Company revealed plaintiff's personnel materials to state and federal investigators -- that is, "between September 1988 and March 1989." (Amended Comp. ¶ 7(a)). Plaintiff responds that his § 1983 action did not accrue either until he was convicted, on August 13, 1992, or until he was discharged from his position with the Company, on August 31, 1992.

An action accrues under § 1983 when the alleged conduct has caused the claimant harm and the claimant knows or has reason to know of the allegedly impermissible conduct and the resulting harm. Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980), cert.

denied, 450 U.S. 920 (1981). The only "harm" cognizable under § 1983 is an intentional infringement of a "constitutionally or federally guaranteed right." See Olsen v. Lane, 832 F. Supp. 1525, 1527 (M.D. Fla. 1993). Here, as the excerpted portion of the proposed amended complaint demonstrates, plaintiff invokes his privacy rights as the source of his alleged injury. He claims that those rights were infringed by an unlawful "search and seizure," without "due process" of law. In other words, the harm plaintiff describes is an invasion of his "zone of privacy." See Day v. Morgenthau, 909 F.2d 75, 77 (2d Cir. 1990).

Plaintiff's privacy was invaded neither by his dismissal nor by his conviction; plaintiff's privacy interest was compromised -- if at all -- when defendant revealed his personnel materials to federal investigators. See Kaster v. Iowa, 975 F.2d 1381, 1382 (8th Cir. 1992) ("Kaster's cause of action arose when the state officials searched and seized his property, not when Kaster's state court action concluded.") (citations omitted); Jacobs v. Village Of Tuckahoe, Local 456 International Brotherhood Of Teamsters, 94 civ. 4888, 1996 WL 355376, * 2 (S.D.N.Y. June 27, 1996) ("The invasion of plaintiff's privacy constituted the harm at issue. Therefore, the date of plaintiff's discharge is immaterial for tolling purposes."). According to the allegations in the Complaint, the intrusion into plaintiff s privacy occurred "between

September 1988 and March 1989." (Amended Comp. ¶ 9). Further, in his pleadings, plaintiff confirms that he was on notice of the alleged invasion of his privacy during this same period of time. (Amended Comp. at ¶ 7(c) (alleging that, in late 1988, a United States postal inspector told plaintiff that the government had obtained plaintiff's employment records)). Plaintiff's § 1983 claim accrued, therefore, more than three years before he filed his complaint in 1995; specifically, accrual occurred in the late 1980's, when plaintiff became aware of the alleged intrusion into his "zone of privacy." See Day, 909 F.2d at 77; see also Moore v. McDonald, 30 F.3d 616, 620 (5th Cir. 1994) (holding that claim as to an "allegedly unreasonable search" of plaintiff's car accrued as of the time plaintiff became aware of the search); accord Kaster, 975 F.2d at 1382.

Thus, the conspiracy plaintiff describes in his amended complaint -- a conspiracy to deprive plaintiff of his privacy interests -- can not now be the subject of a § 1983 cause of action. Moreover, in light of his factual allegations, the "injuries" which plaintiff refers to in his Opposition -- ie., his discharge and his prosecution -- could not, in any event, serve as the basis for a viable claim under § 1983.

A claim under "§ 1983 is aimed at state action and state actors." Roche v.

John Hancock Mutual Life Ins. Co., 81 F.3d 249, 253 (1st Cir. 1996). In order for a private defendant to be liable under § 1983, that defendant must -- in close cooperation with a state actor -- deprive a plaintiff of a legally protected interest. Id. at 253-54 ("private actors may align themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp of § 1983."). Based upon plaintiff's allegations, however, the state's decision to prosecute plaintiff in this action can not be viewed as a decision which the state made in combination with defendant. Whatever defendant's role in initially implicating plaintiff in any misconduct, there can be no liability flowing to defendant based upon the state's subsequent and independent decision to pursue a criminal prosecution against plaintiff. Id. at 254 (holding that defendant employer's alleged misconduct in providing federal authorities with recordings of threatening phone calls allegedly made by plaintiff was insufficient to implicate defendant in a § 1983 conspiracy relating to plaintiff s subsequent prosecution); cf. Benavidez v. Gunnell, 722 F.2d 615, 618 (10th Cir. 1983) ("The mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under §§ 1983 or 1985."); Butler v. Goldblart Brothers, Inc., 589 F.2d 323, 327 (7th Cir. 1978) ("we decline to hold that the mere act of furnishing information to law enforcement officers

constitutes 'joint [activity] with state officials in the prohibited action'") (citations omitted), cert. denied, 444 U.S. 841 (1979).

Similar reasoning applies with respect to plaintiff's discharge. Defendant's termination of plaintiff from his position with the Company was a singularly private act; that is, defendant's decision to terminate plaintiff's employment was defendant's alone, and was not undertaken with any state coercion or input. See Olsen, 832 F. Supp. at 1528 (holding that defendant, a private employer, could not be liable to plaintiff, under § 1983, for unjust termination); Hudson v. S.D. Warren Co., 665 F. Supp. 937, 939 (D. Me. 1987) ("Although . . . it is undisputed that Plaintiff was discharged based on information provided by the State Police Defendants, the decision to discharge itself was wholly within the province of the [private employee] Defendants."). In short, plaintiff's allegations may or may not describe a conspiracy between defendant and various state actors to intrude upon plaintiff's "reasonable expectations of privacy" by sharing his protected personnel materials between 1988 and 1989. However, plaintiff's allegations in no way support a claim of a conspiracy relating to subsequent events -- there is no indication that defendant was responsible for convicting plaintiff in 1992, or that the state was responsible for firing him in that same year.

Thus, assuming plaintiff has described an otherwise actionable conspiracy to deprive him of his protected privacy interests, it is a conspiracy which occurred outside the applicable limitations period. This is fatal to plaintiff's § 1983 claim because his allegations do not describe any actionable conspiracy relating to events which fall within the relevant period -- that is, either plaintiff's discharge or his criminal conviction. Accordingly, plaintiff is denied leave to amend his complaint. See Microtel Franchise & Dev. Corp. v. Country Inn Hotel, 923 F. Supp. 415, 420 (W.D.N.Y. 1996) ("While ordinarily leave to amend is granted, dismissal with prejudice is appropriate where the pleading defect is not curable and repleading would be futile.").

CONCLUSION

For the reasons set forth above, plaintiff s Complaint is dismissed, and his request for leave to file an amended complaint is denied. The Clerk of the Court is directed to enter judgment in defendant's favor dismissing the Complaint in its entirety.

SO ORDERED

Dated: New York, New York
November 12, 1996

/S/
Sonia Sotomayor
U.S.D.J.

APPENDIX C -- JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - x
RICHARD F. HEANING,

Plaintiff,

-against- **95 Civ. 8111 (SS)**

NYNEX -- NEW YORK, **JUDGMENT**
also known as New York
Telephone Company,

Defendant.
- - - - - - - - - - - - - - - - - x

Defendant having moved for summary judgment and the said motion having come before the Honorable Sonia Sotomayor, United States District Judge, and the Court thereafter on November 12, 1996 having rendered its Opinion (77582) and Order, granting the defendants' motion, it is

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (77582) and Order of November 12, 1996, defendants' motion for summary judgment is hereby granted and the Complaint is dismissed, it is further,

ORDERED, ADJUDGED AND DECREED: That plaintiff's request for leave to file an amended complaint is denied.

DATED: New York, New York
November 13, 1996

JAMES M. PARKISON

Clerk of Court

BY:

/S/
Deputy Clark

APPENDIX D -- FEDERAL RULE OF CIVIL PROCEDURE 15

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence

is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaing the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a

mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.